Continuity with Deficiencies: The New Basic Law of Hungary

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Hungarian constitutional law – New Basic Law – Continuity with the previous democratic Constitution – Vision of the political community embedded in the new Basic Law – The level of protection of fundamental rights – Continuity and lack of foreseeability in the organisation of the state – European legal procedures against or about Hungary – The life prospects of the new Basic Law – Danger of constitutional crisis whenever the government does not hold a constitution-amending majority

On 18 April 2011, the Parliament passed a new constitution under the title *The Basic Law of Hungary* (*Magyarország Alaptörvénye*).[1] One week later, on 25 April, the new Basic Law was promulgated by the President of the Republic in the official gazette (*Magyar Közlöny*). That day was not only Easter Monday, but also the first anniversary of the latest elections won by the conservative governing parties (Fidesz and KDNP). The *Transitional Provisions of the Basic Law of Hungary* (*Magyarország Alaptörvényének Átmeneti Rendelkezései*, henceforth Transitional Provisions) were passed on 30 December 2011. The Basic Law and the Transitional Provisions came into force on the same day, 1 January 2012.

The preparatory works of the new Basic Law, as well as its actual content, were harshly criticised by the opposition parties in Hungary, who claimed that these anti-democratic and non-transparent processes signal the end of the rule of law and democracy. These charges were vehemently denied by the government. The arguments exchanged were echoed by foreign politicians and the media, where critical voices dominated throughout. In the foreign press, an image of the gradual dismantling of Hungarian democracy seems to be spreading.[2]

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[2] P. Krugman, 'Depression and Democracy', *The New York Times*, 12 Dec. 2011, p. A23; 'Hungary's Rush to Autocracy', *The Washington Post*, 9 Jan. 2012, <www.washingtonpost.com/opinions/hungarys-rush-toward-autocracy/2012/01/09/gIQA38ebmP_story.html>, visited 16 Jan. 2013.

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Due to the rushed drafting process, Hungarian legal scholars could not really influence the codification either (despite swiftly organised conferences, other public events, and, in certain cases, personal conversations).[3] The new Basic Law was passed against the practically unanimous and clear disapproval of Hungarian constitutional lawyers.[4] The number of analyses published on the topic in English and German is increasing, most of them critical.[5]

The present essay seeks to answer the question whether the Basic Law remains within the mainstream of European constitutionalism. It is argued that the text of the Basic Law provides no grounds for an 'emerging dictatorship', even though some of its provisions raise valid concerns, and will consequently receive due criticism on the following pages.

Of course, a brief essay cannot cover the whole of the Basic Law. Thus, the present investigation is limited to six issues: the continuity with the previous democratic Constitution, the vision of the political community embedded in the new Basic Law, the level of protection of fundamental rights, continuity and lack of foreseeability in the organisation of the state, European legal procedures against or about Hungary, and the life prospects of the new Basic Law.[6]

[3] There were two private draft constitutions composed by constitutional lawyers (one of these was written by one of the authors of the present essay). *See* A. Jakab, 'A Magyar Köztársaság Alkotmánya. Magántervezet' [*A Private Draft of the Constitution of the Republic of Hungary*], *Az új Alaptörvény keletkezése és gyakorlati következményei* (HVG-Orac 2011), p. 70-173; Cs. Gáli et al., 'Az új alkotmány egy tervezete' [*A Plan for the New Constitution*], <www.tordaicsaba.hu/newconst/ALK%20I-XIV%20final.pdf>, visited 16 Jan. 2013. It was sad and disappointing to see these drafts, both based on comparative studies, being followed by those drafting the Basic Law only sporadically and often on unimportant issues, despite various efforts to persuade them otherwise.

[4] *See*, e.g., J. Zlinszky, 'A húsvéti alkotmányról: Igen-igen, nem-nem?' [*On the Eastern Constitution: Yes-Yes, No-No?*], *Új Ember* (March 2011) p. 1 at p. 3; L. Sólyom, 'A kétharmad nem törtszám' [*Two Thirds Is Not a Quotient*], 6 *Heti Válasz* (2011) p. 1 at p. 40; A. Jakab, 'Az Alkotmánybíróságról szóló rész így aligha elfogadható' [*The Passages Concerning the Constitutional Court Are Probably Unacceptable*], <www.origo.hu/itthon/20110310-jakab-andras-a-ppke-docense-az-uj-alkotmany-tervezeterol.html>, visited 16 Jan. 2013.

[5] For brief analyses published in German, *see*, H. Küpper, *Einführung in das ungarische Recht* (C.H. Beck 2011) p. 295; H. Küpper, 'Mit Mängeln: Ungarns neues Grundgesetz', 12 *Osteuropa* (2011) p. 135 et seq.; G. Halmai, 'Hochproblematisch: Ungarns neue Grundgesetz', 12 *Osteuropa* (2011) p. 145 et seq. For a short analysis in English, *see*, K. Kovács and G.A. Tóth, 'Hungary's Constitutional Transformation', 7 *EuConst* (2011) p. 183 et seq. For a full and detailed descriptive work in English, though without much evaluation, *see* L. Csink et al. (eds.), *The Basic Law of Hungary* (Clarus Press 2012). These works were all written before the Transitional Provisions were passed.

[6] The present article draws heavily on the following book by A. Jakab, *Az új Alaptörvény keletkezése és gyakorlati következményei* [*The Birth and the Practical Consequences of the New Basic Law*] (HVG-Orac 2011).

Continuity or discontinuity? The Basic Law and the previous constitution

The Democratic Constitution of Hungary after 1989

At the time of the democratic transition in 1989, the Hungarian Socialist Workers' Party and the democratic opposition agreed to a total revision of the communist Constitution, originally adopted in 1949 (henceforth the Constitution). The substantively new, but formally old Constitution, however, was meant to be provisory. The text of its Preamble stated from 1989 onwards, similarly to the German *Grundgesetz* before its amendment on 23 September 1990, that the Constitution shall be valid only until a new constitution is adopted.[7] To allow the parties of the former democratic opposition formally to adopt a new constitution after the first free elections held in spring 1990, the Constitution was relatively flexible. Constitutional amendments and the adoption of a new constitution in Article 24(3) required only a two-thirds majority of all MPs (of the one-chamber Parliament).[8] However, by autumn 1990 it became clear that the parties of the former democratic opposition were divided so strongly that a new constitution could not be agreed.[9] Even the coalition governing between 1994 and 1998, which had a constitution-making two-thirds majority in Parliament, could not succeed in framing a new basic law. Thus, the flexibility of the Constitution only allowed for it to be amended : between the first (1990) and the latest (2010) free elections, a total of 22 amendments have been adopted.

The lack of formal constitution-making has led to two kinds of hiatus. On the one hand, the constitutional reform in 1989 showed signs of haste and resulted in a text containing gaps as well as contradictions, even after the correcting amendments of 1990. On the other hand, a symbolic reflection of the democratic transition did not appear in the Constitution. Even though there were no major links in terms of substance between the 1989 democratic and the 1949 communist constitutional provisions, the Constitution still officially had to be referred to as

[7] After 23 Oct. 1989, the preamble of the Constitution stated that 'In order to facilitate a peaceful political transition to a state under the rule of law, realizing a multi-party system, a parliamentary democracy and a social market economy, the Parliament hereby establishes the text of the Constitution of our country – until the adoption of the new Constitution of our country – as follows.'

[8] Z. Szente, '24. § [Az Országgyűlés működésének szabályai]' [*The Rules of Functioning of the Parliament*], in J. András (ed.), *Az Alkotmány Kommentárja* [*Commentary on the Constitution*] (Századvég 2009) p. 798 at para. 59. This interpretation relied on Art. 24 para. (3) of the Constitution, which used the term 'change' (*megváltoztatás*) rather than 'amendment' (*módosítás*) for constitutional amendments, whereas it was the latter that was usual in Hungarian legal terminology.

[9] *See* P. Tölgyessy, 'A mgayar parlamentáris hagyomány íve és az újabb alkotmányozás' [The Tendencies of the Hungarian Traditions of Parliamentarism and the Latest Constitution-making] in A. Jakab and A. Körösényi András (eds.) *Alkotmányozás Magyarországon és máshol* [Contstitution-making in Hungary and Elsewhere] p. 256, 272 et seq.

the 'Act 20 of 1949.' Or to put it differently: even though substantively there was no continuity between the democratic constitutional system on the one hand and the former communist constitutional system on the other, a formal and symbolic discontinuity was missing. The latter may have contributed to the lack of emotional attachment that the population felt towards the 1949/1989 Constitution.

The Constitutional Court could endeavour to deal with most of the (rather minor) substantive imperfections by means of interpretation. The Court used its authority of ex-post review to fill the gaps in the text, and to make the Constitution efficient and a real standard for law-making. Moreover, the Constitutional Court became known and renowned quite quickly, not least because of its 1995 decisions concerning the austerity package of the then finance minister Lajos Bokros.[10]

The lacking political legitimacy could not, however, be provided for by the Constitutional Court. What perhaps could have created it were two decades of economic, political, and moral success. Yet all this was unfortunately missing: the economic problems, which were created partly by the Hungarian politicians themselves, and the dysfunctional political system made it politically possible to campaign against the Constitution (which was done by political powers partly in order to exonerate themselves, as they could avoid speaking about their own mistakes when condemning the last twenty unsuccessful years). Coupled with the relative flexibility of the Constitution, this led to the eventual downfall of the Constitution of 1989.

Already before the general elections in spring 2010, when the polls showed the probability of an overwhelming victory for the Fidesz party (and its ally, the KDNP), there was increasing anxiety that the winning coalition would use its constituent majority to make a constitution. Although the Fidesz party did not make such an intention explicit before the elections, after its victory and the acquisition of a constituent majority it announced that it was going to make a new constitution.[11] Surveys have since shown,[12] however, that the citizens were not convinced about the need for a new constitution and even the Speaker of the Parliament later admitted that a new constitution was not necessary.[13] The phrase

[10] For a critical view, *see* A. Sajó, 'Reading the Invisible Constitution: Judicial Review in Hungary', 15 *Oxford Journal of Legal Studies* (1995) p. 253 et seq.; for a more sympathetic view, *see* Sonnevend, *supra* n. 9.

[11] A Nemzeti Együttműködés Programja [*The Programme of National Co-operation*] (the programme of the government led by Viktor Orbán), passed on 29 May 2010, <www.parlament.hu/irom39/00047/00047.pdf>, visited 16 Jan. 2013.

[12] 'A kormánypárti szavazók szerint sem kell új alkotmány' [*Not even For-Government Voters Wish for a New Constitution*], <www.index.hu/belfold/2010/12/21/a_kormanyparti_szavazok_szerint_sem_kell_uj_alkotmany>, visited 16 Jan. 2013.

[13] 'Kövér: Az Alaptörvény közhelygyűjtemény' [*Kövér: The Basic Law is a Collection of Platitudes*], <index.hu/belfold/2011/11/09/kover_az_alaptorveny_kozhelygyujtemeny/>, visited 16 Jan. 2013.

'revolution in the polls', used by the government, suggests that there is no continuity between the old Constitution and the new Basic Law, which claims to be the final step of the democratic transition. Whether this is true will be analysed in the following section.

The Basic Law: discontinuity in rhetoric and continuity in substance

The constitution-making process, led by Fidesz and rejected by the opposition parties,[14] resulted in a text that through its rhetoric suggests a return to the historical roots of the Hungarian state, whereas its normative content is borrowed from the democratic Constitution of 1989. An analysis of the preamble (entitled *Nemzeti hitvallás,* literally 'National Avowal of Faith') in terms of its style, editorial mistakes, political biases, and historical misinterpretations would go beyond the scope of this essay.[15] Yet the name 'Basic Law', the role of the historical constitution, and a statement in the preamble according to which '[w]e do not recognise the communist constitution of 1949, since it was the basis of a tyrannical rule; therefore we proclaim it to be invalid', deserve attention from the perspective of continuity.

First of all, the use of the expression 'Basic Law' (*Alaptörvény*) instead of 'Constitution' (*Alkotmány*) needs to be examined. In our opinion, this usage stems from a certain historicising attitude.[16] It is not that the name 'Basic Law' reflects any historical tradition: the term and concept were unknown to Hungarian positive law. The historicising attitude can be observed in the avoidance of using the word 'constitution', which would refer to an individual document.

As it is widely known, the constitution of Hungary before 1949 comprised a number of important statutes (beginning with those of Saint Stephen), doctrines, and customs forming together the 'historical constitution.'[17] An important part of that historical constitution was the Doctrine of the Holy Crown, formulated

[14] *See* Küpper 2011 Einführung, *supra* n. 5, p. 295; A. Vincze and M. Varju, 'Hungary, The New Basic Law, European Public Law', 18 *European Public Law* (2012) p. 437 et seq.

[15] On this, *see* Küpper 2011, *Einführung*, *supra* n. 5, p. 298 and A. Jakab 2011, *supra* n. 6, p. 180.

[16] Küpper 2011, *Einführung*, *supra* n. 5, p. 296.

[17] The historical constitution of Hungary has provoked comparative analyses since early times, *see* Gy. Aranka, *Anglus és magyar igazgatásnak egyben-vetése* [*A Comparison of English and Hungarian Governments*] (Hochmeister 1790); B. Barits, *Conspectus regiminis formae regnorum Angliae et Hungariae* (Srogh 1790). From more recent literature, *see* B. Grosschmid, *Werbőczy és az angol jog* [*Werbőczy and English Law*] (Franklin-Társulat Nyomdája 1928). *See also* Z. Szente, 'A historizáló alkotmányozás problémái: A történeti alkotmány és a Szent Korona az új Alaptörvényben' [*The Problems of Historicising Constitution-Making: The Historical Constitution and the Holy Crown in the New Basic Law*], 3 *Közjogi Szemle* (2011) p. 1 et seq.

in written form by István Werbőczy.[18] This blend of medieval organic theories and crown-doctrines regarded the Estates and the monarch as 'members of the Holy Crown.' Political power did not stem from the monarch but from the Holy Crown, which was used to crown the King. The monarch became authorised to exert his powers only as a result of the (complete) act of coronation. The territory of the Kingdom was owned by the Holy Crown ('Countries of the Hungarian Holy Crown'). According to this conception, the King only had a mandate to exert public power in the name of the Crown.

The makers of the 2011 Constitution expressed their respect for this tradition in several ways. The use of the name 'basic law' for the constitution may be understood in this light as well. It suggests that the Basic Law *(Alaptörvény)* is only one of the important 'laws' *(törvények)* forming the historical constitution of the Country, a concept expressly referred to in the Preamble and Article R (2) of the Basic Law. This could mean that the constitutional rank of the Basic Law as the single highest law of the land is being challenged.[19] Yet such an interpretation is out of question. The Basic Law declares itself explicitly in its Article R (1) to be the foundation of the legal order. This means that laws which contradict the Basic Law are invalid, and they shall be annulled by the Constitutional Court (with the exception of financial, tax and budgetary statutes, *see infra*). In this sense no discontinuity arose in respect of the hierarchical structure of the legal order.[20] This is also highlighted by the fact that the Basic Law was adopted on the basis of the provisions of the previous Constitution applicable to amendment of the constitution and the adoption of a new constitution.[21] Thus, the title pays respect to the pre-WWII historical constitution in a rhetorical, but not in a legal, sense.

Another discontinuity is suggested by the preamble of the Basic Law, which declares the Constitution of 1949 'invalid.' It is worth noticing, however, that Point 2 of the Closing Provisions clearly contradicts this declaration, as it provides that the Basic Law was passed according to the procedure described by the democratic 1949/1989 Constitution it replaced. Thus, the *rhetorically* important but normatively weak preamble signals a discontinuity, while the *legally* decisive Closing Provisions suggest continuity.

[18] From recent German publications, *see* G. Máthé, *Die Lehre der ungarischen Heiligen Krone in: Die Problematik der Gewaltentrennung* (Gondolat 2004) p. 17. The best discussion of the topic remains F. Eckhart, *A szentkorona-eszme története* [*The History of the Idea of the Holy Crown*] (MTA 1941).

[19] Similarly Cs. Gáli et al., 'Száz pont az alkotmánytervezetről' [*Hundred Remarks on the Draft Constitution*], <www.igyirnankmi.blog.hu>, visited 20 March 2012.

[20] The Basic Law is actually not even a 'law' ('törvény') according to its own definition, but has a unique legal nature, *see* the terminology used in Art. R) para. (2), Art. S) and Art. 6.

[21] Point 2 of the Closing Provisions: 'Parliament shall adopt this Basic Law according to point *a)* of sub-Section (3) of Section 19 and sub-Section (3) of Section 24 of Act XX of 1949.'

This internal contradiction seems less harsh if we consider that the Basic Law appoints 2 May 1990 as the beginning of the new constitutional order. This means that the 'invalidity' of the 1949 Constitution only refers to its shape until 2 May 1990 and says nothing about the Constitution in force until 31 December 2011. This would imply that the Constitution of the communist era is declared to be invalid by the preamble. However, even this would lead to absurd results, as it would question the validity of a number of laws passed between 1949 (the year of the adoption of the communist Constitution) and 1990, including the Civil Code or the Penal Code.

It is therefore to be assumed that the declaration of the invalidity of the communist Constitution in the preamble can be regarded only as mere political rhetoric. At the same time, by limiting this political rhetoric to the period before 2 May 1990 the constitution-making power acknowledges the values of the democratic Constitution that was in force until the constitution-making in 2010/2011, and does not deny continuity in that sense. This has important consequences for the question (to be discussed later) of how far the democratic Constitution of 1989 and the jurisprudence of the Constitutional Court relating thereto informs the interpretation of similarly worded provisions of the Basic Law.

Article R) (3) suggests yet another discontinuity with the previous Constitution with its referral to the 'achievements of the historical constitution' as an aid to interpretation. From a rhetorical perspective, this can be regarded as a revival of the historical constitution, yet this provision is practically unusable. On the one hand, it is not quite clear which laws exactly should be regarded as part of the 'historical constitution.'[22] On the other hand, several of the laws that may qualify to be part of the 'historical constitution' are unacceptable by today's standards (e.g., medieval rules bound to the then social circumstances), or simply do not

[22] Not least because the legal system had a much more primitive doctrine of rules. The reason for compiling the first *Corpus Iuris Hungarici* (a private compilation) in the 16th century was that many ancient laws were simply forgotten. In such a legal system (which never had a complete and authoritative list of legal rules) it was impossible to make it clear on the occasion of issuing a new law exactly which rules had to be repealed. Thus, new laws repealed older ones even if they did not provide for their explicit repeal (today we would say that they applied a 'material derogation'). Because of this material derogation, the historical constitution could not create parallel rules that would contradict one another. Thus, even if the provision of the preamble quoted above could mean that the historical constitution enters into force as positive law (which it cannot mean, as being part of the *preamble* it cannot have such normative force), only those parts of it that are *not* contrary to the Basic Law of 2011 could be applied today. Consequently (and supposing that the Basic Law covers all problems of constitutional law), that reference is a tautology even according to the inherent logic of the pre-WWII historical constitution, and can by no means lead to medieval rules being revived. On the various kinds of derogation, *see* A. Jakab, 'Problems of the Stufenbaulehre', 20 *Canadian Journal of Law and Jurisprudence* (2007) p. 56 et seq.

conform to a republican form of regime.[23] To avoid absurdities, some scholars recommend using the word 'achievement' as a filter,[24] in the sense that what is to be regarded as an 'achievement' has to comply with international treaties on human rights and the modern conception of constitutionalism. Interpreted in this way, the reference to the historical constitution is a mere tautology.

A partly different solution is advocated by László Sólyom. According to his method of interpretation, 'the historical constitution' is a flexible concept which can be adapted to ever changing circumstances.[25] Sólyom thus argues that nothing forces us to regard the historical constitution as a concept which refers to the period before 1944 rather than one that comprises the achievements of modern constitutionalism. In his view, Article R), paragraph (3) tells us that the constitutional case-law as developed by the Constitutional Court over the last two decades forms part of the historical constitution as an aid to interpretation of the Basic Law.[26]

Recently, the Constitutional Court gave a clear positive answer to the question of continuity in its decision 22/2012. (V. 11.) AB of 11 May 2012.[27] In this decision, the Constitutional Court declares that it will continue to use and refer to all of its decisions made under the 1989 Constitution, provided that the relevant provisions of the Basic Law are essentially the same as those in the previous Constitution. The Court even states that a deviation from the previous practice requires express justification. Surprisingly, however, the decision does not link this result to any specific provision of the Basic Law nor does it elaborate on the possible implications of its language discussed above.

The vision of the political community

Since the fall of communism, there has been an interesting division in the approach to the Hungarian nation taken by Hungarian legal sources: internally – i.e., within the territory of Hungary – the term 'nation' seems to be understood sometimes as a civic/political and sometimes a an ethnic/cultural nation;[28] externally – i.e.,

[23] Szente, *supra* n. 16.

[24] Jakab, *supra* n. 6, p. 184, 199.

[25] Szente, *supra* n. 16, p. 1.

[26] As László Sólyom, former President of the Constitutional Court, and later President of the Republic, put it in an interview: 'The Invisible Constitution is part of the historical constitution.' *See* <www.hetivalasz.hu/itthon/solyom-laszlo-az-uj-alkotmanyrol-37067>, visited 16 Jan. 2013.

[27] 22/2012. (V. 11.) AB hat, Magyar Közlöny 2012/57. para. 40.

[28] In Hungary, the legal order has expressed an ethnic-cultural-Hungarian vision with strong minority protection since 1989 (in a rhetorically more ethnic form since the enactment of the new Basic Law in 2011), even though the vision of the political left is rather the civic (US) model, *see* A. Batory, 'Kin-State Identity in the European Context: Citizenship, Nationalism and Constitu-

beyond the territory of Hungary – it seems to be conceived as a clear-cut ethnic/cultural nation.[29] Such logical inconsistency concerning the subject of the constitution is not unusual.[30]

This fuzzy picture did not change with the approval of the Basic Law in 2011. For internal purposes, the concept is used sometimes in a civic sense, sometimes in an ethnic/cultural sense. Examples for a civic use are found in, e.g., Article *J)* Basic Law which mentions '*national* holidays' when it means 'state holidays' (the most important national holiday even bears the name '*official* state holiday'), and 'the family as the basis of the *nation's* survival' in Article *L)* refers to the general demographic situation (and not to ethnicity). Similarly, the 'the *nation's* common heritage' in Article *P)* of the Basic Law also includes the culture of the ethnic minorities; when the President of the Republic 'embodies the unity of the *nation*' according to Article 9, it is meant to include all citizens of the country; and when Article 38 describes state property as '*national* assets', or when issues of '*national* security' are regulated, then the concept of 'nation' is ethnic-neutral.

The preamble of the new constitution begins with the words 'We, the members of the Hungarian *Nation*.'[31] Whether it uses the term 'nation' in an ethnic or cultural sense as the *pouvoir constituant* is not entirely clear, but there are probably stronger arguments for an ethnic/cultural interpretation. An argument for the ethnic nature of the term is the following paragraph of the preamble:

> We [i.e., the 'Hungarian Nation'; *AJ-PS*] promise to preserve the intellectual and spiritual unity of our *nation* torn apart in the storms of the past century. The nationalities living with us form part of the Hungarian political community and are constituent parts of the State.

tionalism in Hungary', 16 *Nations and Nationalism* (2010) p. 31 at p. 42. The difference is also expressed when naming the country: the political left prefers 'the Republic of Hungary', whereas the political right prefers just 'Hungary' (without actually intending to change the state form).

[29] H. Hornburg, 'The Concept of Nation in the Hungarian Legal Order', in A. Jakab et al., *The Transformation of the Hungarian Legal Order 1985-2005* (Kluwer Law International 2007) p. 507.

[30] For Spain, *see* E. Martínez-Herrera and T.J. Miley, 'The Constitution and the Politics of National Identity in Spain', 16 *Nations and Nationalism* (2010) p. 6 at p. 8.

[31] The preamble is called 'National Avowal of Faith' giving a quasi-religious taste to the self-description of the nation. For more detail on the English and Hungarian terminology, *see* F. Horkay Hörcher, 'The National Avowal', in Csink et al. (eds.), *supra* n. 5, p. 26. Other religious elements in the new Basic Law are the motto which is in fact the first line of the national anthem written in 1823 ('*God* bless the Hungarians') and references to the *Holy* Crown as a symbol of Hungarian historical statehood (though not adopting the Doctrine of the Holy Crown). On the quasi-religious nature of nations in general, *see* J.R. Llobera, *The God of Modernity: The Development of Nationalism in Western Europe* (Berg Publishers 1994).

The first sentence refers to ethnic Hungarians living abroad (note that they are part of the nation), the second to ethnic non-Hungarians living in Hungary (note that the nationalities are not part of the 'Nation' but of the 'State').

On the other hand, the last sentence of the preamble refers to a civic concept of the nation ('We, the citizens of Hungary' used now as synonymous with 'We, the members of the Hungarian Nation', italics added):

> Our Basic Law [...] is a living framework expressing the *nation's* will and the form in which we wish to live. *We, the citizens of Hungary,* are ready to found the order of our country upon the cooperation of the *nation*.

Thus the picture about the use of the term 'nation' changes all the time and is possibly even deliberately contradictory. The preamble confirms, on the one hand, that the concept of nation is an ethnic one ('We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the past century'),[32] but at the same time, right in the next sentence, we find a non-ethnic inclusive definition of the political community conceived as a group of ethnic groups ('The nationalities living with us form part of the Hungarian political community and are constituent parts of the State.').

The actual rules about ethnic/national minorities living in Hungary reflect, however, a vision in which a dominant ethnic majority recognises the ethnic minorities. These minorities are recognised as cultural entities with special constitutional privileges (autonomies, language rights, seats in the Parliament to be won with lower thresholds than otherwise).

It seems that the Basic Law of 2011 differs from its predecessor through a stronger rhetorical emphasis on ethnic Hungarians (not only in the preamble but e.g. also in a new Article *H)* on the state's duty to protect the Hungarian language, which does not seem to bear any concrete legal relevance;[33] in Article *D)* with a more detailed description of the state's responsibility for ethnic Hungarians abroad than in the former Constitution).[34] But it also contains – maybe as something

[32] The nation 'torn apart' is an implied reference to the Trianon Peace Treaty which meant that territories inhabited by several million ethnic Hungarians (amongst other ethnic groups) became parts of Hungary's neighbouring countries. On the topic, *see* A. Jakab, 'Trianon Peace Treaty (1920)', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, <www.mpepil.com>, visited 16 Jan. 2013.

[33] Jakab, *supra* n. 6, p. 190.

[34] Art. D). 'Bearing in mind that there is one single Hungarian nation that belongs together, Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, shall facilitate the survival and development of their communities, shall support their efforts to preserve their Hungarian identity, the application of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.'

balancing out the latter – a stronger emphasis on the group rights of ethnic minorities within Hungary.

Guarantees of fundamental rights

The substantive continuity between the previous Constitution and the Basic Law can be best observed in the chapter on fundamental rights. This applies to the tests of the limitation of fundamental rights, the liberty rights and the ban on negative discrimination. The new classification of social fundamental rights as mere 'state purposes' brought no change in terms of content either, if one looks at the previous interpretation of these rights by the Constitutional Court. The Transitional Provisions, however, raise serious concerns in terms of the fundamental rights of the individual, particularly for the principle of *nullum crimen sine lege* and the right to a lawful judge.

The guarantee of essential content and the principle of proportionality as limits of fundamental rights

The Basic Law does not depart from the tradition of the previous Constitution, as it stipulates the limits of fundamental rights in one single article. Previously, Article 8(2) of the Constitution provided for the guarantee of essential content as the sole limit of fundamental rights.[35] On this basis, the Constitutional Court developed the concept of the guarantee of relative essential content,[36] practically equating it with the principle of proportionality.[37] Although there are several references in the decisions of the Court to the tripartite principle of 'suitability–necessity–proportionality in the narrow sense' developed by German constitutional law,[38] this test was normally used by the Court in a shorter form. This means

[35] 'In the Republic of Hungary rules pertaining to fundamental rights and duties shall be determined by statute, which, however, shall not limit the essential content of any fundamental right.'

[36] It was only on one occasion that the Constitutional Court seemed to use the essential content in an absolute sense. In connection with the proportionality of capital punishment, the Court ruled that capital punishment would lead to the annihilation of the right to life and human dignity, which is contrary to Art. 8, para. (2) of the Constitution. *See* Decision 23/1990. (X. 31.) AB, ABH 1990, 88, 92. The concurring opinion of the President of the Constitutional Court went even further, arguing that the right to life is the absolute essential content in itself, which cannot therefore be limited. *See* Decision 23/1990. (X. 31.) AB, ABH 1990, 88, 106. It is primarily this concurring opinion that is the basis of scholarly debates on the guarantee of essential content in a relative sense (to be discussed below). G. Brunner, 'Vier Jahre ungarische Verfassungsgerichtsbarkeit', in G. Brunner and L. Sólyom, *Verfassungsgerichtsbarkeit in Ungarn, Analysen und Entscheidungssammlung* (Nomos 1995) p. 54.

[37] First in Decision 20/1990. (X. 4.) AB, ABH 1990, 69, 71.

[38] First in Decision 20/1990. (X. 4.) AB, ABH 1990, 69, 71.; then in Decision 7/1991. (II. 28.) AB, ABH 1991, 22, 25.; Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 171. *See also* Brunner,

that a limitation of a fundamental right is contrary to the present Constitution if there is no compelling reason for it, or if it is disproportionate for the aim it serves.[39]

The Constitutional Court applied, at least in its rhetoric, a strict measure to decide what counts as a compelling reason for the purposes of Article 8, paragraph (2) of the Constitution. According to the Court, interference with a fundamental right can only be justified by the protection of another fundamental right or a constitutional value.[40] The only exception is the right to property, which may be limited in favour of an unqualified public interest. This strict measure was, however, considerably softened by the Court's broad interpretation of the concept of 'other constitutional values.'[41]

The Basic Law enshrines the guarantee of the essential content in Article I, paragraph (3), and complements it with an explicit formulation of the principle of proportionality. As regards proportionality, the second sentence of Article I, paragraph (3) makes a clear reference to the previous practice of the Constitutional Court: 'A fundamental right may be restricted only in order to allow the exercise of another fundamental right or to protect a constitutional value, to the extent that is absolutely necessary, proportionate to the objective pursued, and respecting the essential content of the fundamental right.'

This change, it seems, is not going to influence the application of the principle of proportionality. A new feature is, however, that the guarantee of essential content and the principle of proportionality are juxtaposed in the text. This necessarily attributes an independent meaning to the guarantee of essential content, which cannot be interpreted in the usual way any longer. This suggests that the guarantee of the essential content now has to be understood in an absolute sense.[42] According to this, the essential content protects the most important aspects of the exercise of fundamental rights, forming some kind of a hard core which is inaccessible for the public power, for each fundamental right. In everyday practice this interpretation may change much, as it is unlikely that the hard core of a funda-

supra n. 36, p. 55; and G. Halmai and G.A. Tóth, 'Az emberi jogok korlátozása' [*The Limitation of Human Rights*], in G. Halmai and G.A. Tóth (eds.), *Emberi jogok* [*Human Rights*] (Osiris 2003) p. 130.

[39] First in Decision 8/1991. (III. 5.) AB, ABH 1991, 30, 32.

[40] *See* e.g., Decision 6/1998. (III. 11.) AB, ABH 1998, 91, 98.

[41] Therefore the Constitutional Court has referred to concepts such as the 'cleanliness of public life' („közélet tisztasága') [Decision 20/1990. (X. 4.) AB, ABH 1990, 69, 71.], the 'public order' (*közrend*) [Decision 30/1992. (V. 26.) AB, ABH 1992, 167, 178.], the 'public morals' (*közerkölcs*) [Decision 20/1997. (III. 19.) AB, ABH 1997, 85, 92.], and 'considerable public interest' (*nyomós közérdek*) [Decision 56/1994. (XI. 10.) AB, ABH 1994, 312, 313.] as reasons legitimating intervention.

[42] *See*, in particular, B. Remmert, 'Article 19 para. (2)', in T. Maunz and G. Dürig, *Grundgesetz Kommentar* (C.H. Beck 2011), para. 28 et seq.

mental right will be violated by a law or its application.[43] Still, the guarantee of an absolute essential content, as an addition to the principle of proportionality, adds a further keystone to the structure of the Basic Law.

Individual liberties, the prohibition of negative discrimination, and social fundamental rights

As for rights of liberty and equality, the Basic Law (partly) basically copies the catalogue of fundamental rights as contained in the previous Constitution and supplements it with fundamental rights contained in the EU Charter of Fundamental Rights, as e.g., the prohibition of cloning in Article III, paragraph (3).[44] The Basic Law also features the right to self-defence, which is, in fact, rather difficult to interpret.[45]

Apart from certain exceptions, the text of the Basic Law does not lower the level of protection provided for fundamental rights by the Constitution. One of these exceptions is the possibility of an actual life sentence for 'intentional violent crimes', which is allowed for explicitly by Article IV, paragraph (2). Although similar punishments do exist in Italian (*ergastolo,* Article 22 of the Italian Penal Code[46]), English and Welsh (*whole life order,* Criminal Justice Act 2003[47]), Dutch (*levenslange gevangenisstraf,* Article 10 of the Dutch Penal Code[48]), and French law (*réclusion criminelle à perpétuité,* Articles 221-3 and 221-4 of the French Penal Code[49]), these examples are harshly criticised in the

[43] German commentaries agree in not attributing much relevance to Art. 19 para. II Grundgesetz, which contains the guarantee of essential content. Remmert, *supra* n. 42, para. 47, with further references.

[44] The Hungarian term used here for cloning (*egyedmásolás*, lit. 'cloning of individuals') may be the result of a mistranslation. It probably refers to the 'prohibition of the reproductive cloning of human beings' in Art. 3 of the EU Charter of Fundamental Rights.

[45] Including this fundamental right may follow US patterns, E. Volokh, 'State Constitutional Rights of Self-Defense and Defense of Property', 11 *Texas Review of Law & Politics* (2007) p. 399.

[46] Art. 176 of the Italian Penal Code as a general rule allows for probation *(liberazione condizionale)* after 26 years in cases of life sentence but Art. 4Bis of the Act on Penal Execution *(legge sull'ordinamento penitenziario, 26 luglio 1975 n. 354)* as a special rule prohibits any mitigation for a range of crimes (e.g., human trafficking, terrorism, or *associazione mafiosa,* i.e., mafia crimes), if the perpetrator does not co-operate with the authorities (i.e., (s)he shows no repentance). Thus, if life imprisonment is applied by the judge in such a case, because of aggregate sentences and/or aggravated cases, then it means actual life imprisonment.

[47] D. van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (Brill Academic Publishers 2002) p. 78-133.

[48] C. Noorduyn, 'Life is Life in Netherlands', *IBA Legal Practice Division – Criminal Law Committee Newsletter* (2008) p. 12-15.

[49] On the debates concerning the latest amendments to French law, *see* S. Enguéléguélé, 'L'institution de la perpétuité réelle', 1 *Revue de science criminelle et de droit pénal comparé* (1997) p. 59-71.

literature.[50] At the time the Basic Law was passed it was doubtful that an unlimited imprisonment, which was already provided for in the Hungarian Penal Code, was in conformity with Article 3 of the European Convention on Human Rights.[51] Recently, however, the European Court of Human Rights decided, in the case *Vinter* v. *UK*,[52] that the actual life sentences given to the applicants for murder could not be considered as inhuman or degrading treatment in themselves.

No real change is brought about by the explicit reference of Article L), paragraph (1) of the Basic Law, according to which 'Hungary shall protect the institution of marriage, understood to be the conjugal union of a man and a woman established by their voluntary decision, and the family as the basis of the nation's survival.' This provision, which is not in the chapter on the fundamental rights but in the chapter entitled 'Fundamentals', does not change the legal situation, since the previous Constitution also mentioned the protection of marriage among its general provisions.[53] Similarly, the definition of marriage as a life union between a man and a woman does not bring any substantial change either: the Constitutional Court already defined marriage on the basis of the 1949/1989 Constitution as the relationship between a man and a woman.[54] To this extent, the Basic Law only codifies the already existing practice of the Court. Moreover, the explicit reference to the concept of heterosexual marriage in the text of the Basic Law does not preclude the introduction of same-sex marriage, as can be seen by the Spanish example.[55] As to abortion, it is also the previous practice of the Constitutional Court that is codified in the Basic Law : that is, no real legal change has been made here either (the 'foetus protection' of Article II of the Basic Law already existed in the same legal form, as an obligation of objective institutional protection).[56]

Similarly, no significant change has been made to the rules concerning social rights, which were formulated in the previous Constitution as fundamental rights. Some of these are defined by the Basic Law as state tasks rather than fundamental

[50] A. Demetriades et al., 'Life Imprisonment as Inhuman and Degrading Treatment', 5 *European Human Rights Law Review* (2008) p. 656.

[51] ECtHR 12 Feb. 2008, Case No. 21 906/04, *Kafkaris* v. *Cyprus*, paras. 89, 95-99. *See* Jakab, *supra* n. 3, p. 205.

[52] ECtHR 17 Jan. 2012, Case Nos. 66 069/09, 130/10 and 3896/10, *Vinter* v. *UK*.

[53] Art. 15 of the Constitution stated that 'The Republic of Hungary shall protect the institutions of marriage and family.'

[54] Decision 154/2008. (XII. 17.) AB, ABK Dec. 2008, 1655. *See* A. Jakab, 'Az Alkotmánybíróság első határozata a bejegyzett élettársi kapcsolatról' [*The First Decision of the Constitutional Court on Registered Partnership*], 2 *Jogesetek magyarázata* (2010) p. 9 et seq.

[55] *See* Jakab, *supra* n. 4, p. 194.

[56] *See* Jakab, *supra* n. 4, p. 203-204.

rights (e.g., the right to work[57] and social security).[58] But these were already interpreted as such by the Constitutional Court and they therefore amounted to constitutional measures that were generally not directly enforceable.[59] Moreover, the Basic Law introduces several new social fundamental rights. Examples of these social provisions include the right to work conditions which respect health, safety and dignity in Article XVII, paragraph (3), which was Article XVIII (1) of the Charter of Fundamental Rights of the EU.

Problems of protection of fundamental rights arise, however, from the preamble of the Basic Law. Certain of its passages, if interpreted in a particular way or regarded as standards of interpretation in the light of Article R), paragraph (3), may lead to a lower level of protection for the fundamental rights acknowledged by the Basic Law. Such a passage is, for example, the one referring to the nation-preserving role of Christianity, or the one according to which the most important forms of living together are 'the family and the nation' which 'provide the most important framework for our coexistence', and 'our fundamental cohesive values are fidelity, faith and love.' If such interpretations are to be avoided, these parts of the preamble also have to be interpreted in the light of international treaties on human rights (which is made possible by Article Q)) and treated as merely symbolic statements.[60]

The transitional provisions

The Basic Law applies a unique technique inasmuch as it provides specifically for the adoption of the Transitional Provisions to the Basic Law. Point 3 of the Closing Provisions of the Basic Law provides that the Parliament passes the Transitional Provisions connected to the Basic Law according to the rules of the previous Constitution on constitutional amendments. Since these provisions[61] are also the legal basis of the Basic Law itself, it seems reasonable to suppose that the constitution-maker intended to attribute to the Transitional Provisions a rank similar to that of the Basic Law itself (we shall come back to this issue below).

The fact that the Transitional Provisions contain particular limitations of fundamental rights raises serious issues. Articles 1 and 2 of the Transitional Provisions allow for such limitations in respect of dealing with the past inasmuch as they allow for exemptions from the statute of limitations for politically motivated crimes

[57] Art. 70/B of the Constitution, now in Art. XII para. (2) of the Basic Law.

[58] Art. 70/E of the Constitution, now in Arts. XIX and XXII of the Basic Law.

[59] Sonnevend, *supra* n. 9, p. 977; P. Sonnevend, 'Armut und Verfassung: Die Rechtslage in Ungarn', in Hofmann et al. (eds.), *Armut und Verfassung, Sozialstaatlichkeit im europäischen Vergleich* (Verlag Österreich 1998) p. 327, 300.

[60] Such an interpretation was suggested, e.g., by Jakab, *supra* n. 4, p. 182.

[61] Art. 19 para. (3) point *a)* and Art. 24 para. (3) of the Constitution.

committed but not prosecuted in the communist regime and for the unlimited reduction of the pensions of the leaders of the communist regime. These provisions are clearly designed to overrule the previous jurisprudence of the Constitutional Court.[62]

Article 11 paragraphs (3) and (4) of the Transitional Provisions are, in turn, obviously problematic for the right to a lawful judge.[63] In order that judicial procedures are finished within a reasonable time [cf. Article XXVIII, paragraph (1) of the Basic Law], the head of Hungarian judicial administration (the President of the National Judicial Office) is entitled to allocate individual cases. Given the internal structure of the Hungarian judiciary system, this may in certain cases result in the President of the National Judicial Office determining, albeit indirectly, which particular judge is going to decide a certain case. A similar entitlement was given to the Chief Prosecutor in criminal cases. A few days before the Transitional Provisions were adopted, on 19 December 2011, the Constitutional Court declared certain provisions of the Act on Criminal Procedure, which had essentially the same content, null and void, as these were contrary to the European Convention on Human Rights and the Constitution (then still in force).[64] It may well be regarded as a response to that that the constitution-maker added the respective passages to the text of the Transitional Provisions at the last minute before they were passed.

Beyond these directly fundamental rightsrelated provisions, the Transitional Provisions – *inter alia* – also regulate the continuity of the personnel in independent institutions. These provisions – which attracted the attention of European Institutions as well – will be dealt with below.

Whether the Transitional Provisions are of the same level as the constitution, and whether they are subject to constitutional review, were at first open questions.[65] The fact that the Transitional Provisions were passed in a procedure provided for

[62] It should be noted that recent legislation (or rather the lack of it) may be taken to suggest that the anti-communist rhetoric of the Transitional Provisions is not serious but rather just a means of political positioning. Concerning the continuing lack of transparency in issues of the communist secret service, esp. the list of former domestic secret agents, *see* Ungváry Krisztián, 'Hazugságkényszer' [*Obsessive Lying*], <www.komment.hu/tartalom/20120305-velemeny-ungvary-krisztian-ugynokaktak-nyilvanossaga-a-magyar-politika-csodje.html>, visited 10 Jan. 2013.

[63] A similar conclusion is drawn by the Opinion of the Venice Commission (19 March 2012) No. 663/2012 (CDL-AD(2012)001) on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts in Hungary, <www.venice.coe.int//docs/2012/CDL-AD%282012%29001-e.pdf>, visited 16 Jan. 2013.

[64] Decision 1149/C/2011. AB, <www.mkab.hu/admin/data/file/1147_1149_11.pdf>, visited 16 Jan. 2013.

[65] For a detailed discussion, *see* L. Csink and J. Fröhlich, 'Az Alaptörvény és az Átmeneti rendelkezések viszonya' [*The Relationship of the Basic Law and the Transitional Provisions*], 2 *Pázmány Law Working Papers* (2012), <www.plwp.jak.ppke.hu/images/files/2012/2012-2.pdf>, visited 16 Jan. 2013.

constitution-making and that the text of the Transitional Provisions suggested a position equal to that of the Basic Law (Article 31 paragraph (2) declares that the Transitional Provisions are part of the Basic Law) argued in favour of regarding it as such. Such a status was, however, questionable by virtue of the fact that the Transitional Provisions were passed as a separate document and their constitutional rank was not declared expressly by the Basic Law. Such a declaration would have been possible, as e.g. in case of Article 6 paragraph (1) of the Treaty on the European Union, which explicitly grants the Charter of Fundamental Rights a status equal to that of the Treaty. It was also of importance that from 2012, the basis of the Hungarian legal system is the Basic Law, as is declared explicitly by Article R) paragraph (3) (in the singular, suggesting one single document). This explicit declaration implied that the constitution-making power did not want to make several documents of constitutional rank, which might contradict one another. On the basis of Article R) paragraph (3), it was arguable that the Transitional Provisions might be of constitutional rank only insofar as their content actually deals with *temporary* matters related to the suspension of the previous Constitution and the new constitution (the Basic Law) entering into force. In the light of the practice of the Constitutional Court, even a more radical approach seemed possible, as Decision 1260/B/1997 AB explicitly affirms the possibility of constitutional review of constitutional amendments if a specific amendment did not become part of the text of the Constitution.[66] According to this logic, all of the Transitional Provisions could have to be reviewed on the basis of the Basic Law, the latter having unlimited precedence over the former. In these matters, the last word has to be that of the Constitutional Court, which is possible following a petition by the Commissioner of Fundamental Rights.[67]

These considerations seem to have been rendered obsolete by the First Amendment of the Basic Law.[68] Probably to prevent any speculation on the status of the Transitional Provisions and a possible review by the Constitutional Court, Article 1 paragraph (1) of the First Amendment included a new Point in the Closing Provisions of the Basic Law which stipulates explicitly that 'the Transitional Provisions adopted according to Point 3 [of the Closing Provisions] (31 December 2011) are part of the Basic Law.' This specific reference to the actual Transitional Provisions adopted on 30 December 2011 and published 31 December 2012 eliminates the possibility of challenging the constitutional rank of the Transitional Provisions.

[66] Decision 1260/B/1997. AB, ABH 1998, 816, 819.

[67] The text of the motion is available at <www.ajbh.hu/allam/jelentes/201202302Ai.rtf>, visited 16 Jan. 2013.

[68] Magyarország Alaptörvényének Első Módosítása (2012. június 18.) Magyar Közlöny 73/2012, 11856.

Continuity and rupture in the organisation of the state

As for the form of government, the Basic Law brings no change. Hungary remains a unitary (i.e., not a federal) state, a republic,[69] and a parliamentary democracy. At the centre of the structure of political power is the Prime Minister elected by the Parliament (which still works as one chamber), with the general powers of control and guidance of the PM explicitly provided by Article 18 paragraph (1) of the Basic Law. The President of the Republic is, as before, elected by the Parliament according to Article 10 of the Basic Law. His or her authority remains essentially limited to protocol, except for the powers related to legislation. Article 6 paragraph (4) entitles the President to send any law passed by the Parliament to the Constitutional Court for preliminary review before he/she signs it. Moreover, Article 6 paragraph (5) grants the President the power to send any law back to Parliament for further consideration before he/she signs it, together with his or her comments, in case he/she disagrees with (part of) it, rather than sending it for preliminary constitutional review (there is nothing new in that, either). There is no real extension of the powers of the President related to the dissolution of Parliament either. Article 3 paragraph (3) provides that he/she may dissolve the Parliament in two circumstances, setting at the same time a date for the elections: (1) if the Parliament does not, after the mandate of the Cabinet has ended, elect the person recommended for Prime Minister by the President within forty days after the first recommendation was made; or (2) if the Parliament does not adopt the relevant year's central Budget by 31 March.[70]

Despite the basic continuity that can be observed in the part regulating state organisation, the Basic Law allows for possibilities of veto that may make the situation of the government even more difficult in the future. Moreover, the Basic Law also contains a curtailment of the Constitutional Court's powers, which cannot be reconciled with the principle of constitutional adjudication.

Possibilities of veto

A future majority government may face two sorts of massive obstacles allowed for by the Basic Law. On the one hand, Article 44 paragraph (3) sets a high threshold

[69] Art. B) para. (2) of the Basic Law makes this explicit. Changing the official name of the country from 'Republic of Hungary' (*Magyar Köztársaság*, lit. 'Hungarian Republic') to 'Hungary' (*Magyarország*) has no legal consequences.

[70] Art. 28 para. (3) provided for the dissolution of Parliament in the following circumstances: 'The President of the Republic may dissolve Parliament, simultaneously with the announcement of new elections, if: (a) Parliament expresses its lack of confidence in the Government on no less than four occasions in a period of twelve months during the course of one parliamentary term; or (b) the mandate of the Government terminated, a candidate for Prime Minister nominated by the President of the Republic is not elected by Parliament within a period of forty days from the day upon which the first candidate was nominated.'

by giving the power of approval to the newly established Budget Council; on the other hand, the scope of the so called 'cardinal Acts' or 'cardinal laws', requiring a two thirds majority, is defined in a way that makes governing without that majority more than difficult.

As for the Budget Council, Article 44 paragraph (3) provides that before the laws on the central Budget are passed, the Council has to approve them. The Budget Council is composed of three persons, whose terms reach beyond the legislative cycle in which they were elected.[71] It has been suggested that if a new government is elected, a veto of the Budget Council loyal to the previous majority may prevent a budget being adopted, which may, in turn, lead to the President dissolving Parliament according to Article 3 paragraph (3).[72]

A right of approval by a non-parliamentary organ does in fact question the sovereignty of Parliament in terms of the budget. Yet it is fair to note that, according to Article 44 paragraph (3), the Budget Council may use its power only to enforce the limit placed on state debt that was newly introduced by Article 36 paragraphs (4) and (5). These articles mean that if the Budget Council abuses its power to deny approval, this would not prevent Parliament from passing the budget. Moreover, even a legitimate refusal to approve a budget would not in itself impede the passing of that budget, nor would it entitle the President to refuse to sign the Budget without further grounds. A lack of approval by the Budget Council for the budget is ultimately a constitutional issue, which has to be ruled on by the Constitutional Court, either in the form of a preliminary review, if initiated by the President, or an *ex-post* constitutional review on the basis of a petition from some of those entitled to it (the relevant possibility is that one fourth of the MPs may submit such a petition).

It has to be noted, too, that Article 3 paragraph (3) Point *(b)* of the Basic Law speaks of the budget not being adopted before 31 March as one of the possible grounds for dissolving the Parliament. According to one interpretation, this implies that the budget has to be adopted in a legitimate way, i.e., an illegitimate budget (one passed in spite of a legitimate veto from the Budget Council) cannot be regarded as adopted from the perspective of Article 3 paragraph (3) Point *(b)*. Yet another interpretation, a textualist one based also on the function of Article 3 paragraph (3) Point *(b),* cannot be excluded either, according to which passing the Budget is always a measure to see if the government has a parliamentary majority, and the dissolution of Parliament is the sanction for the lack of a majority. Ac-

[71] According to Art. 44 para. (4) of the Basic Law, 'The members of the Budget Council shall be the President of the Budget Council, the Governor of the National Bank of Hungary and the President of the State Audit Office. The President of the Budget Council shall be appointed for six years by the President of the Republic.'

[72] Küpper 2011, *Einführung*, *supra* n. 5, p. 300.

cording to this interpretation, if the Budget has a parliamentary majority, i.e., the budget is adopted (as required by Article 3 paragraph (3) point *(b)*), dissolving Parliament is out of the question, even if the budget was otherwise adopted contrary to Article 44 paragraph (3).

No matter which interpretation one chooses, the final decision on the legality of passing the budget lies with the Constitutional Court rather than with the President of the Republic alone. In this sense, refusing to sign the budget without asking for a preliminary preview would clearly be against the constitution. Thus, a situation allowing for the dissolution of the Parliament could arise only if the Parliament passed the budget despite the – constitutionally grounded – veto of the Budget Council, which would then be examined by the Constitutional Court, in the form of either a preliminary or an *ex-post* review and decided to the effect that the passing of the budget is to be regarded as invalid.

The case of the so called 'cardinal Acts' is, however, a reason for serious concern. The previous Constitution already required a two-thirds majority for a wide range of legislative subject-matters. These laws are termed 'cardinal Acts' by Article T) paragraph (4).[73] While the number of subjects requiring a special majority did not increase with the Basic Law (in fact, their number fell from 28 to 26, which means that the regulation of several guarantees of fundamental rights does not require a two thirds majority),[74] the range of the of the subject-matters covered changed considerably. According to the Basic Law, the following are determined by 'cardinal Acts' : the rules on the protection of families;[75] the requirements for preserving and protecting national assets, as well as for the responsible management thereof;[76] the scope of the exclusive property and of the exclusive economic activities of the State, as well as the limitations and conditions of the alienation of national assets of outstanding importance for the national economy;[77] the basic rules for the sharing of public burdens and for the pension system,[78] and the detailed rules on the operation of the Budget Council.[79]

In the present legislative cycle, the governing parties possess the necessary majority to adopt these cardinal Acts. However, a future government having a simple majority without support from the opposition will be limited in shaping its economic and financial policies. Given the deep cleavages between the different wings of Hungarian politics, this may quickly lead to a stalemate in the case of any future

[73] Art. T) para. (4) of the Basic Law: 'Cardinal Act shall mean an Act, the adoption or amendment of which requires the votes of two-thirds of the Members of Parliament present.'

[74] *See* Jakab, *supra* n. 4, p. 173.

[75] Art. L) para. (3) of the Basic Law.

[76] Art. 38. para. (1) of the Basic Law.

[77] Art. 38. para. (2) of the Basic Law.

[78] Art. 40. of the Basic Law.

[79] Art. 44. para. (5) of the Basic Law.

cabinet that does not have a two-thirds majority in Parliament. This, in turn, may raise further issues in the light of Protocol 1 to the European Convention on Human Rights, which guarantees the possibility of the democratic majority`s right to govern.[80]

Limits of constitutional review

Although the Basic Law maintains the institution of constitutional adjudication, it has changed its character. According to the previous Constitution, constitutional review was abstract in character, as it dealt only with general rules, while individual acts of the application of law were outside its scope. The abstractness of the procedure notwithstanding, Article 32/A paragraph (4) of the Constitution, as well as Act 32 of 1989 on the Constitutional Court Article 21 paragraph (2) provided that *ex-post* constitutional review could be initiated by anyone, which necessarily made the Court, in such a combination, a major political actor, as it had the ability, if it wanted, to take a position on any debated issue of legislation. This broad *locus standi*, exceptional in Europe,[81] was abolished by the Basic Law. The constitutional complaint as defined by Article 24 paragraph (2) of the Basic Law follows German patterns, and allows for the review of both legislation and of judicial decisions, but generally only if personal involvement can be proved.[82] This way, constitutional review now has the protection of individuals' rights as its main function, while the possibility of abstract control has not disappeared either.

This change in the character of the Constitutional Court, which had already been urged by constitutional lawyers, is a welcome development. For the same reason, the Venice Commission praised the extension of constitutional review to

[80] Opinion No. 618/2011. of 17-18 June 2011 of the European Commission for Democracy through Law (CDL-AD(2011)016.) para. 24, <www.venice.coe.int/docs/2011/CDL-AD(2011)016-e.pdf>, visited 16 Jan. 2013.

[81] Opinion No. 614/2011 of 25-26 March 2011 of the European Commission for Democracy through Law (CDL-AD(2011)001, para. 57, <www.venice.coe.int/docs/2011/CDL-AD%282011%29001-e.pdf>, visited 16 Jan. 2013. In Europe, *actio popularis* exists only in Bavaria, Serbia, Montenegro and Macedonia. In Croatia, there exists some kind of an independent *actio popularis*, which does not compel the Constitutional Court to start the procedure. On these countries, *see* B. Wieser, *Vergleichendes Verfassungsrecht* (Springer 2005) p. 140.

[82] According to Art. 24 para. (2) of the Basic Law: 'The Constitutional Court shall a) examine adopted but not yet published Acts for conformity with the Basic Law; b) review, on the initiative of a judge, the conformity with the Basic Law of rules of law applicable in a particular case; c) review, on the basis of a constitutional complaint, the conformity with the Basic Law of the rules of law applied in a particular case; d) review, on the basis of a constitutional complaint, the conformity with the Basic Law of a judicial decision; e) review, on the initiative of the Government, of one fourth of all Members of Parliament or of the Commissioner for Fundamental Rights, the conformity of rules of law with the Basic Law; f) examine whether rules of law are in conflict with international treaties; and g) perform further tasks and exercise further competences laid down in the Basic Law or in a cardinal Act.'

judicial decisions,[83] and made it clear that the suppression of *actio popularis* is not contrary to European constitutional traditions.[84]

What is worrying, however, is the change in the abstract *ex-post* review of legislation. With the abolishment of *actio popularis*, such a procedure can be initiated only by the Cabinet, the Commissioner of Fundamental Rights, or one fourth of the MPs. This, in itself, seems acceptable. Yet in the present legislative cycle, none of the opposition parties has one fourth of the places in the Parliament. Thus, the radical right and the left-wing fractions of the opposition have to co-operate to be able to submit a petition to the Constitutional Court. This gives the impression that the right to make a petition is tailored to the voting proportions of the present legislative cycle, so the constitutive majority can impede the submission of petitions. The only authority which is able to initiate abstract *ex-post* review of legislation during the present legislative period against the will of the government is therefore the Commissioner of Fundamental Rights, who actually did file some petitions which are obviously embarrassing for the government.[85]

The gravest problems are, however, raised by the curtailment of the Constitutional Court's powers, already introduced in November 2010 in the 1949/1989 Constitution and then included in the Basic Law as Article 37 paragraph (4). According to the provision,

> as long as the level of state debt exceeds half of the Gross Domestic Product,[86] the Constitutional Court may, within its competence pursuant to points *b)* to *e)* of Paragraph (2) of Article 24, review the Acts on the central budget, on the implementation of the budget, on central taxes, on duties and on contributions, on customs duties, and on the central conditions for local taxes as to their conformity with the Basic Law exclusively in connection with the rights to life and human dignity, to the protection of personal data, to freedom of thought, conscience and religion, or in connection with the rights related to Hungarian citizenship, and it may only annul these Acts for the violation of these rights. The Constitutional Court shall have the right to annul without restriction Acts governing the above matters if the procedural requirements laid down in the Basic Law for the making and publication of such Acts have not been observed.

[83] Opinion No. 614/2011 of 25-26 March 2011 of the European Commission for Democracy through Law (CDL-AD(2011)001, para. 62, <www.venice.coe.int/docs/2011/CDL-AD%282011%29001-e.pdf>, visited 16 Jan. 2013.

[84] Opinion No. 614/2011 of 25-26 March 2011 of the European Commission for Democracy through Law (CDL-AD(2011)001, para. 64, <www.venice.coe.int/docs/2011/CDL-AD%282011%29001-e.pdf>, visited 16 Jan. 2013.

[85] The texts of the petitions can be downloaded at <www.ajbh.hu>, visited 16 Jan. 2013.

[86] The limitation based on temporary austerity is a new one, yet it will not affect the limitation of powers in the near future. Currently, the Hungarian state debt accounts for 80% of the GDP, and, according to the most optimistic views, may get below 50% in twenty years.

Article 27 of the Transitional Provisions adds that the curtailment shall continue to apply to all those laws which were adopted during the (current) high state debt period also in the future when state debt sinks under 'half of the gross domestic product.' Consequently, the competence of the Constitutional Court will *never* cover some of the presently debated economic laws, and once it regains its competences, this will only apply for future laws.

The practical relevance of these provisions is probably low: they will probably affect only a limited number of cases. The reason for this is that certain fundamental rights can still be referred, the right to human dignity in particular, which has been defined by the practice of the Court as a 'mother right.' It is for this very reason that the Court was able to use the right to human dignity in its Decision 37/2011. (V. 10.) AB (ABK May 2011, 407) to review a retroactive confiscatory law related to taxation, although the above limitation had already been in force by then. Yet the right to human dignity cannot be used to eliminate all violations of fundamental rights, as is shown by the Decision 37/2011. (V. 10.) AB. Here the Court was prevented from using such obvious standards as the prohibition of retroactive legislation following from the principle of the rule of law. Nevertheless, it ruled that an income tax introduced retroactively for the time before the current budget year violates human dignity, whereas retrospective taxing within the current budget year does not amount to the violation of this right.

In the light of this, Article 37 paragraph (4) has created an unacceptable gap in constitutional review, which has also been criticised by the Venice Commission.[87] Article 37 paragraph (4) says that the constitution may be violated without any sanction if justified by economic or budgetary considerations. Moreover, this supposition of the constitution-maker is based on an obvious mistake, since the rule of law does not impede the success of economic policy. Quite the contrary, the perfect functioning of the rule of law is the basis of an economic life based on trust and it allows for the creation of a positive atmosphere for investments.

Selective continuity of personnel in independent institutions

According to Article 8 of the Transitional Provisions, all functionaries elected according to the Constitution are to remain in office. MPs, mayors, the President of the Republic, the Cabinet, etc. can keep their offices. However, different provisions apply for the Commissioner for Data Protection and the President of the Supreme Court (Transitional Provisions Articles 11 and 16). The office of the Commissioner was abolished and replaced with a new data-protection agency. It

[87] Opinion No. 614/2011 of 25-26 March 2011 of the European Commission for Democracy through Law (CDL-AD(2011)001, para. 9, <www.venice.coe.int/docs/2011/CDL-AD%282011%29001-e.pdf>, visited 16 Jan. 2013.

seems to us that the precocious ending of the Commissioner's mandate is against the law of the European Union.[88] An even more grave case was the removal of the President of the Supreme Court by the governing majority (under the pretext of the renaming of the Court to 'Curia' (*Kúria*)) before the end of his mandate. Such a move can be acceptable only after the end of an autocratic regime, or if the judge breaks the law. Here, however, neither of these was the case. This is made even more problematic by the fact that both public officers were previously attacked in the media by members of the government.

European procedures against or about Hungary

Since the beginning of the constitutional changes in 2010, a series of international and European procedures have been conducted against or about Hungary. Here, we are going to concentrate on the Venice Commission of the Council of Europe, the European Commission and the European Parliament.[89]

The Venice Commission

During the constitution-making process, the Venice Commission issued two opinions. The first one was at the request of the Hungarian Government (more precisely: of its Deputy PM) before the actual text of the then draft Basic Law was known (henceforth: First Opinion),[90] the second at the request of the Monitoring Committee of the Parliamentary Assembly of the Council of Europe after the adoption of the Basic Law (henceforth: Second Opinion).[91]

[88] Cf. Art. 28 of the Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, and ECJ 9 March 2010, Case C-518/07, *European Commission* v. *Federal Republic of Germany*, para. 25. For the details, *see* <helsinki.hu/wp-content/uploads/barroso_dpa_independence_20111106_printed.pdf>, visited 16 Jan. 2013.

[89] For further international documents about some issues of the legal changes, *see* OSCE, Analysis of the Hungarian Media Legislation, 28 Feb. 2011, available at: <www.osce.org/fom/75990>, visited 16 Jan. 2013; Council of Europe, Opinion of the Commissioner for Human Rights on Hungary's media legislation in the light of Council of Europe standards on freedom of the media, CommDH(2011)10, 25 Feb. 2011; letter from the Council of Europe Commissioner for Human Rights, Thomas Hammarberg, to Mr János Martonyi, Minister for Foreign Affairs of Hungary, CommDH(2012)4, 12 Jan. 2012, available at <wcd.coe.int/ViewDoc.jsp?id=1892969>, visited 16 Jan. 2013.

[90] Opinion on three legal questions arising in the process of drafting the new Constitution of Hungary, Opinion No. 614/2011. (CDL-AD(2011)001, Strasbourg, 28 March 2011); <www.venice.coe.int/docs/2011/CDL-AD(2011)001-e.pdf>, visited 16 Jan. 2013.

[91] Opinion on the new Constitution of Hungary, No. 618/2011. (CDL-AD(2011)016, Venice, 17-18 June 2011); <www.venice.coe.int/docs/2011/CDL-AD(2011)016-e.pdf>, visited 16 Jan. 2013.

The First Opinion dealt with three major questions, and some additional ones. The first question was basically whether a 'good domestic charter of fundamental rights' should be identical with the EU Charter of Fundamental Rights. The Venice Commission answered this question in the negative, as according to its view an identical text could lead to concurring (or even conflicting) interpretations while hiding the supranational origin (and the connected supremacy) of the EU Charter. Thus, the incorporation of the EU Charter into the text of the Constitution would *not* strengthen the protection of fundamental rights, and consequently it is *not* advisable. Rather, the Constitution should provide for the interpretation of domestic human rights in the light of international instruments. The drafters followed this advice (*see* esp. Articles *E)* and *Q)*).

The second question of the First Opinion concerned the role of *ex ante* review. At the beginning of the drafting process, politicians of Fidesz were enthused by the idea that in one of the European countries, namely in France (according to their knowledge), there was no *ex post* review, only *ex ante* review, thus there was no danger that a constitutional court could annul laws once promulgated. Due to interviews, public conference talks, articles in dailies and weeklies and personal talks with some constitutional lawyers,[92] they must have realised even before submitting the questions to the Venice Commission that the *ex ante* review does not replace the *ex post* review and that recently *ex post* review has also been introduced in France.[93] Thus the question became how to frame the possibilities of *ex ante* review. The answer of the Venice Commission was that the competence of *a priori* review should be retained and included in the Basic Law. In case the Basic Law gave the right to initiate the *ex ante* review also to Parliament (and not just to the President of the Republic), then the control should take place only after adoption in Parliament and before publication of the law and, for international treaties, before their ratification. The drafters also followed this advice.

The third question of the First Opinion concerned the role of *actio popularis*. The Venice Commission advised that the regime of *actio popularis*, i.e., the right of everybody to initiate the *ex post* constitutional review of any law without having to show any personal interest, should be ended, as a Germantype constitutional complaint *(Verfassungsbeschwerde)* fulfils its functions better. It also suggested that the right of the ombudsman (called in the 1989 Constitution 'Commissioner of

[92] E.g., L. Szily, 'Jobbos professzorok oktatták a Fideszt' [*Right Wing Professors Educated the Fidesz*], <www.index.hu/belfold/2010/11/11/solyom_alkotmany_salamon/?cp=1>, visited 16 Jan. 2013; A. Jakab interviewed by E. Babus, 'Az alkotmányos rendszer arkhimédeszi pontja az alkotmánybíráskodás' [*The Archimedean point of the constitutional system is the constitutional court*], *HVG*, 15 Jan. 2011, p. 34.

[93] F. Fabbrini, 'Kelsen in Paris: France's Constitutional Reform and the Introduction of *A Posteriori* Constitutional Review of Legislation', 9 *German Law Journal* (2008) p. 1297 et seq.

Citizen's Rights'; renamed in the Basic Law 'Commissioner of Fundamental Rights') to initiate *ex post* review should be retained. The drafters also followed this advice.

The Venice Commission addressed two further issues which were not contained in the request of the Hungarian Government. One concerned the procedure of the drafting, and the Venice Commission emphasised the importance of an open, inclusive and transparent procedure. The other was the issue of the curtailment of the competences of the Constitutional Court in financial, budgetary and tax matters: the Venice Commission encouraged the drafters to restore in full the competences of the Constitutional Court. Unfortunately, none of these points was complied with.

The request for the Second Opinion came on 26 March 2011 as part of an on-going investigation by the monitoring committee – launched on 11 March 2011 – into whether or not to open a so-called 'monitoring procedure' in respect of Hungary after 24 members of the Assembly raised 'serious concerns' about developments in areas related to human rights, the rule of law and the functioning of democratic institutions.[94] The Second Opinion raises the same objections mentioned in its First Opinion, to which it refers back at several points, especially those concerning the competences of the Constitutional Court. At several places it shows how to interpret (or how *not* to interpret) the provisions of the Basic Law in accordance with international standards (abortion, ethnic Hungarians in neighbouring states etc). It appositely criticises that the preamble engraves a debated political narrative of Hungarian history (instead of leaving it up to the ordinary political process and the general public discourse) and thus makes it difficult to gain the emotional attachment of those who disagree with this narrative (paragraph 38). Most of its observations are correct, but a few shortcomings of the opinion (or at least the most disturbing ones) should be mentioned:

(1) The authors of the opinion seem to be unaware of the former case-law of the Hungarian Constitutional Court, and consequently they saw in new formulations of the constitutional text also actual constitutional changes where just the former case-law of the Hungarian Constitutional Court has been codified (e.g., abortion, gay marriage).

[94] Since the inauguration of the Monitoring Committee in April 1997, applications for opening a monitoring procedure have been tabled regarding Latvia in 1997, Austria in 2000, Liechtenstein in 2003, the UK in 2006, Italy in 2006, and Hungary in 2011. Until now, a monitoring procedure has been undertaken only against Latvia (the Hungarian case is still being examined), all the other cases have been closed without launching a monitoring procedure. There are currently ongoing monitoring procedures (all initiated by bodies other than the Monitoring Committee) against the following states (none of them is an EU member state): Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Georgia, Montenegro, the Russian Federation, Serbia and Ukraine. *See* Parliamentary Assembly of the Council of Europe, The monitoring procedure of the Parliamentary Assembly, AS/Mon/Inf(2011)07rev, 7 Sept. 2011, 2f.

(2) The opinion refers to the high number of 'cardinal laws' and the choice of their topics as a problem from the point of view of democracy (paragraph 25). The Venice Commission, however, failed to compare the former constitutional text with the text of the Basic Law: as a matter of fact the number of two-thirds majority laws sank from 28 to 26 (the Commission did not compare the numbers of the Constitution with those of the Basic Law). The problem is in our opinion that now the topics contain more policy issues than before. Thus the Commission should have criticised *only* the choice of topics and not the numbers of 'cardinal laws.'

(3) Originally we agreed with the remarks of the Commission on the lifelong sentence and we also thought that it breached the ECHR (paragraph 69).[95] But, in the meantime, the judgment of the ECtHR in *Vinter and others* v. *UK* (Application Nos. 66069/09 and 130/10 and 3896/10, Judgment of 17 January 2012) has made this objection doubtful.

(4) At some points, the opinion seems to be incoherent: first, it criticises the lack of protection for minority languages, but a few lines below we find that the Basic Law still contains it in the chapter on fundamental rights (paragraph 45).

(5) Further, it views the power of approval of the Budget Council as a danger to democracy (paragraph 129). We disagree with this interpretation, as can be seen above. It is also worth mentioning that the European Union now seems to require similar constitutional debt 'brakes' (without specifying the exact domestic procedural safeguards) from those member states (i.e., all except for the UK and the Czech Republic) who signed the Fiscal Compact on 2 March 2012.[96]

(6) It was also concerned in paragraph 52 of its opinion about the responsibility clause of Article *O)* of the Basic Law ('Everyone shall be responsible for their own self, and shall be bound to contribute to the performance of state and community tasks according to their abilities and possibilities.'). The Venice Commission seemed to be unaware of the fact that this provision was actually borrowed from the 1999 Swiss Constitution (Article 6).

None of the remarks in the Second Opinion has managed to find its way into the Basic Law so far.

As the text of the Basic Law left a few important issues open and delegated these to 'cardinal laws', the question became whether these 'cardinal laws' conform to European standards. As a response to growing international criticism and hoping to be able to show its commitment to European constitutional standards, the

[95] *See* our former article in German: A. Jakab and P. Sonnevend, 'Kontinuität mit Mängeln: Das neue ungarische Grundgesetz', 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2012) p. 88 et seq.

[96] *See* The Fiscal Compact and the European constitutions: 'Europe Speaking German', *EuCon* (2012) p. 1; C. Antpöhler, 'Emergenz der europäischen Wirtschaftsregierung: Das Six Pack als Zeichen supranationaler Leistungsfähigkeit', 2 *ZaöRV* (2012) p. 353-393.

Hungarian Government requested the opinion of the Venice Commission on three 'cardinal laws' (Laws on the Judiciary, Freedom of Religion, and Parliamentary Elections). Shortly after this, in January 2012, the Monitoring Committee of the Parliamentary Assembly of the Council of Europe requested an opinion from the Venice Commission on whether another five further laws were in line with the European Council's standards (Laws on Freedom of Information, the Constitutional Court, Prosecution, Nationalities, and Family Protection). In March 2012, yet another request of the Monitoring Committee of the Parliamentary Assembly was filed, asking the Venice Commission for a review of the Transitional Provisions.

By the completion of this manuscript, six of the expected nine opinions had been published (Laws on the Judiciary, Freedom of Religion, Parliamentary Elections, Constitutional Court, Prosecution, Nationalities), containing mostly criticism of provisions which follow from the Basic Law itself and which we have already criticised above (with numerous additional criticisms of very different provisions which we cannot detail here, due to space restrictions).[97] It is not the topic of the present study to analyse the whole Hungarian legal order (or even all the new legislation of the last two years), but it is interesting to see at least how different was the impact of these opinions on the respective 'cardinal laws'. The opinion on the Law on the Judiciary was taken seriously: most (but not all) of its recommendations were implemented into Hungarian law.[98] The opinion on the Law on the Freedom of Religion, concentrating mainly on the problem that churches have to be recognised by Parliament with a two-thirds majority, a decision against which there is no effective legal remedy and which consequently

[97] Opinion of the Venice Commission (19 March 2012) No. 663/2012 (CDL-AD(2012)001) on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organisation and administration of courts in Hungary; <www.venice.coe.int//docs/2012/CDL-AD%282012%29001-e.pdf>, visited 16 Jan. 2013; Opinion of the Venice Commission (19 March 2012) No. 664/2012 (CDL-AD(2012)004) on Act CCVI of 2011 on the right to freedom of conscience and religion and the legal status of churches, denominations and religious communities in Hungary <www.venice.coe.int/docs/2012/CDL-AD(2012)004-e.pdf>, visited 16 Jan. 2013; Joint opinion of the Venice Commission and of the OSCE/ODIHIR (18 June 2012) No. 662/2012 (CDL-AD(2012)012) on the Act on the Elections of Members of Parliament of Hungary <www.venice.coe.int/docs/2012/CDL-AD(2012)012-e.pdf>, visited 16 Jan. 2013; Opinion of the Venice Commission (19 June 2012) No. 665/2012 (CDL-AD(2012)009) on Act CLI of 2011 on the Constitutional Court of Hungary <www.venice.coe.int/docs/2012/CDL-AD(2012)009-e.pdf>, visited 16 Jan. 2013; Opinion of the Venice Commission (19 June 2012) No. 668/2012 (CDL-AD(2012)008) on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary, <www.venice.coe.int/docs/2012/CDL-AD(2012)008-e.pdf>, visited 16 Jan. 2013; Opinion of the Venice Commission (19 June 2012) No. 671/2012 (CDL-AD(2012)011) on the Act on the Rights of Nationalities of Hungary <www.venice.coe.int/docs/2012/CDL-AD(2012)011-e.pdf>, visited 16 Jan. 2013.

[98] Act No. CXI of 2012 (2 July 2012).

creates the possibility of discrimination, was, however, basically ignored. Official government communication cynically excerpted one sentence stating that the general trend of the Law on the Freedom of Religion was liberal and acceptable, a sentence which was just a polite and benevolent introduction to the actual criticism, and kept silent about the following twenty pages of the opinion, which harshly criticised various parts of the law.

It is difficult to guess the actual reasons for taking the criticism of the Venice Commission of the Law on the Judiciary more seriously, but one possible explanation is that, according to information later leaked to the Press by Hungarian politicians, the independence of the judiciary was apparently also mentioned as an unpublished, but orally and informally confirmed, precondition for the beginning of negotiations for borrowing money by Hungary from the IMF and the EU in desperate times of economic crisis.[99]

The European Commission

The European Commission has shown great interest in these constitutional developments in Hungary. Even before the adoption of the Basic Law, in December 2010[100] and in January 2011[101] the Commission intervened on four aspects of the Hungarian Media Law which it considered not to respect EU law. The Hungarian Government agreed to amend the disputed provisions of the Media Law and the European Commission welcomed the amendments.[102]

In and after December 2011, several issues provoked a new wave of criticism by the European Commission. In a letter dated 12 December 2011,[103] Viviane Reding, Vice-President of the European Commission, raised two issues relating to independent institutions: the sudden reduction of the retirement age of judges from 70 to 62 and the independence of the Data Protection Supervisor. Shortly

[99] 'Kövér: Botrányosak az IMF tárgyalás politikai előfeltételei' [*Kövér: Political Conditions of the IMF Negotiations are Scandalous*], <www.mandiner.hu/cikk/20120403_kover_botranyosak_az_imf_targyalas_politikai_elofeltetelei>, visited 16 Jan. 2013.

[100] Letter of Neelie Kroes, Vice President of the European Commission to Deputy Prime Minister Tibor Navracsics of 23 Dec. 2010, <www.kormany.hu./download/8/01/10000/kroes.pdf>, visited 16 Jan. 2013.

[101] Letter of Neelie Kroes, Vice President of the European Commission to Deputy Prime Minister Tibor Navracsics of 21 Jan. 2011, <www.cmcs.ceu.hu/sites/default/files/domain-69/cmcs-archive/EC_lettertoHungary_2011Jan21.pdf>, visited 16 Jan. 2013.

[102] MEMO/11/89, Media: Commission Vice-President Kroes welcomes amendments to Hungarian Media Law, 16 Feb. 2011, <www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/89>, visited 16 Jan. 2013.

[103] <www.kormany.hu/download/4/8b/60000/Letter%20from%20Vice-President%20Viviane%20Reding%20to%20Vice-Prime%20Minister%20Tibor%20Navracsics.pdf>, visited 16 Jan. 2013.

thereafter, in a letter that was leaked to the press,[104] the President of the European Commission felt obliged to 'strongly advise' the Hungarian Prime Minister to withdraw the Bills of two 'cardinal laws' (on the Hungarian Central Bank and on financial stability) from Parliament because of their incompatibility with European Union law.

It took hardly three weeks for the Commission to take the next step on three of these issues. On 17 January, three Letters of Formal Notice to Hungary were sent as the first stage in the infringement procedure. The letters concerned the independence of the central bank and data protection authorities and certain measures affecting the judiciary.[105] As regards the independence of the Central Bank, the European Commission challenged, *inter alia*, the Minister`s being allowed to participate directly in the meetings of the Monetary Council and the cutting of the remuneration of the incumbent Governor of the Central Bank. The Commission also questioned a Constitutional provision that made it possible for the Central Bank and the financial supervisory authority to merge, thereby downgrading the Governor of the Central Bank to a simple deputy chairman of a merged institution. In reality, this provision is Article 30 of the Transitional Provisions, and is not part of the language of the Basic Law itself.

The Commission characterised the lowering of the mandatory retirement age of judges from 70 to 62 as discrimination at the workplace on grounds of age in the light of the rules on equal treatment in employment (Directive 2000/78/EC). Unlike the situation in the case of the Central Bank, this measure is specifically foreseen by the Basic Law itself, as its Article 26(2) provides that judges can serve only up to the generally applicable retirement age. Probably because of concerns relating to the competence of the EU in this field, the Commission did not argue this case on the basis of the independence of the judiciary. Yet the Commission expressly referred to the independence of the judiciary as it was also asking Hungary for more information regarding new legislation on the organisation of the courts. These questions related to the same issues the Venice Commission addressed in its above mentioned report.[106]

The independence of the data protection supervisory authority became an issue for the European Commission because a new National Agency for Data Protection was created to replace the current Data Protection Commissioner's Office as of 1 January 2012. As a result, the six-year term of the incumbent Data Protection

[104] <www.napifix.postr.hu/napileaks-a-barroso-level-teljes-terjedelmeben-retusalatlanul-kocsis-matenak-es-pinter-sandornak-szeretettel>, visited 16 Jan. 2013.

[105] European Commission - Press release, European Commission launches accelerated infringement proceedings against Hungary over the independence of its central bank and data protection authorities as well as over measures affecting the judiciary, Strasbourg, 17 Jan. 2012, <www.europa.eu/rapid/pressReleasesAction.do?reference=IP/12/24>, visited 16 Jan. 2013.

[106] Compare n. 97 *supra.*

Commissioner was prematurely brought to an end by Article 16 of the Transitional Provisions. The linking points to EU law here were Article 16 of the Treaty on the Functioning of the EU, Article 8 of the Charter of Fundamental Rights and Article 28(1) of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. These provisions of EU law require member states to establish a completely independent supervisory body to monitor the application of the Directive.

Obviously, the European Commission has to respect Article 51(1) of the Charter of Fundamental Rights of the EU, which provides that member states are bound by the Charter only when they are implementing EU law. Accordingly, the Commission has either to demonstrate that Hungary is actually implementing EU law while enacting or applying a certain law, or to have recourse to specific EU legislation. These limits of action by the Commission were implicitly admitted by its President in a plenary debate at the European Parliament on the situation in Hungary.[107] This is probably why the Commission argued the compulsory retirement of judges on the basis of age discrimination, and not on the obvious basis of the independence of the judiciary. Yet in January 2012 the Commission gained more persuasive force as the government of Hungary applied for Balance of Payments aid from the EU and for precautionary financial assistance (stand-by arrangement) by the IMF. As the IMF made it clear that it will not negotiate with Hungary without the European Union,[108] the European Commission seemed to be in a strong negotiating position. From an outside perspective, it even seemed possible that the Commission would demand that Hungary complied with the reports of the Venice Commission in exchange for the initiation of negotiations on financial aid, even if those reports also affected areas clearly beyond the scope of EU law.[109] This would have meant a large scale attempt to enforce European standards of the rule of law beyond the rather strict limits of Article 51(1) of the Charter.

[107] Editorial comments, Fundamental Rights and EU membership: Do as I say, not as I do, 49 *CMLRev* (2012) 481, 486, with further references.

[108] International Monetary Fund Managing Director Christine Lagarde's Statement on Hungary, Press Release No. 12/7, Jan. 12, 2012: 'I indicated that, before the Fund can determine when and whether to start negotiations for a stand-by arrangement, it will need to see tangible steps that show the authorities' strong commitment to engage on all the policy issues that are relevant to macroeconomic stability. Support of the European authorities and institutions would also be critical for successful discussions of a new program', <www.imf.org/external/np/sec/pr/2012/pr1207.htm>, visited 16 Jan. 2013.

[109] As President Barroso put it in a statement before the European Parliament: 'the Council of Europe is currently considering other points of the Hungarian legislation which are under its remit. The Council of Europe Venice Commission could play an important role in this respect.' *See* Editorial comments, Fundamental Rights and EU membership: Do as I say, not as I do, 49 *CMLRev* (2012) 481, 486, with further references.

Nevertheless, following Hungary's replies to the Letters of Formal Notice on 17 February 2012, the Commission first decided to narrow the focus, inasmuch as it issued only two reasoned opinions on 7 March: one on the compulsory retirement of judges and one on the independence of the data protection authority. As regards the independence of the Central Bank and further aspects concerning the independence of the judiciary, the Commission sent two administrative letters demanding further clarifications.[110] It is remarkable that, of these two issues, Hungary showed willingness only to adapt its legislation on the Central Bank: the Commission did not note any progress on the other aspects of the independence of the judiciary.

Ultimately, on 25 April[111] the European Commission noted that the Hungarian Government promised to take into account the Commission's legal concerns on the independence of the Central Bank and to amend its national legislation. Accordingly, Hungary was referred to the European Court of Justice on two counts of infringement, concerning the independence of the data protection authority and the retirement age of judges, prosecutors and public notaries. In relation to the independence of the data protection authority, the Commission took into account that Hungary had partly addressed the Commission's concerns by amending its national legislation to make the new National Agency for Data Protection (which replaced the previous Data Protection Commissioner's Office as of 1 January 2012) independent in line with EU law. Nevertheless, the premature termination of the six-year term of the former Hungarian Data Protection Commissioner remained unresolved and was therefore referred to the ECJ.

Together with these legal steps, the Commission gave up putting pressure on Hungary by delaying the start of the talks on financial aid and announced that it was ready to begin negotiations.[112] The following day the IMF declared that it was ready to start negotiations as soon as adequate steps had been taken to ensure the independence of the central bank as had been discussed with the Hungarian Gov-

[110] MEMO/12/165, Commission takes further legal steps on measures affecting the judiciary and the independence of the data protection authority, notes some progress on central bank independence, but further evidence and clarification needed, Brussels, 7 March 2012. <www.europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/165&format=HTML&aged=1&language=EN&guiLanguage=en>, visited 16 Jan. 2013.

[111] European Commission - Press release, European Commission satisfied with changes to central bank statute, but refers Hungary to the Court of Justice on the independence of the data protection authority and measures affecting the judiciary, Brussels, 25 April 2012, <www.europa.eu/rapid/pressReleasesAction.do?reference=IP/12/395&type=HTML>, visited 16 Jan. 2013.

[112] UPDATE 3-EU gives green light to Hungary aid talks, <www.reuters.com/article/2012/04/25/eu-hungary-aid-idUSL6E8FP50L20120425>, visited 16 Jan. 2013.

ernment.[113] At the time of the completion of this paper it is not known how the ECJ will decide in the two cases brought before it.

These developments can be explained in two different ways. First, one may assume that the Commission first followed a policy of enforcing a large scale review of constitutional matters, but later decided to limit itself to questions where the EU has *prima facie* competences. The challenges the EU faces in the euro crises would certainly have given sufficient reasons to retreat, as also the reluctance of some of the member states to pursue an active human rights policy *vis-à-vis* other member states. The other possible explanation is that the European Commission actually linked the start of financial talks only with the issue of the independence of the Central Bank. As soon as Hungary indicated its willingness to accept the concerns of the Commission, the preconditions for the negotiations were met. This explanation seems to be more realistic, in that one may assume that the European Commission considered the issue of the independence of the Central Bank as an obvious case that is beyond doubt a concern of EU law in the face of Article 130 TFEU. Accordingly, less obvious cases where the competences of the EU might be questioned would never have been linked to the negotiations on financial aid by the European Commission.

The European Parliament

The involvement of the European Parliament seems to show a similar pattern. The first issue that attracted the attention of the European Parliament was the Media Law, which it condemned in a Resolution on 10 March 2011.[114] In that Resolution, the European Parliament called on the Hungarian authorities to restore the independence of media governance and halt state interference with freedom of expression and 'balanced coverage.' Already at this point it became obvious that the European Parliament had considered the Media Law in the context of the whole constitutional structure, as the Resolution called on the Hungarian authorities to involve all stakeholders in the revision of the Media Law and of the Constitution, and referred to the needs of a democratic society founded on the rule of law, with appropriate checks and balances to safeguard the fundamental rights of the minority against the risk of the tyranny of the majority.

Another Resolution was adopted on the Hungarian Basic Law.[115] It seems to be a summary of the two Venice Commission opinions on the Basic Law, with

[113] IMF to talk to Hungary once bank autonomy assured, <www.reuters.com/article/2012/04/26/us-imf-hungary-idUSBRE83P13Y20120426>, visited 16 Jan. 2013.

[114] P7_TA(2011)0094, European Parliament resolution of 10 March 2011 on media law in Hungary, <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0094+0+DOC+XML+V0//EN>, visited 16 Jan. 2013.

[115] European Parliament resolution on the Revised Hungarian Constitution, adopted on 5 July 2011, Eur. Parl. Doc. PE 468.071/17 (2011).

some added broader and rhetorically stronger criticism about the general state of democracy and the rule of law in Hungary. A part of this Resolution merits special attention, because it sheds light on the actual mechanism of how it seems to have been prepared. In paragraph 1(h) of the Resolution we find that the Hungarian Authorities should 'make sure that the incorporation of the Charter of Fundamental Rights into the new Constitution does not cause problems of interpretation and overlapping competences between domestic courts, the new Hungarian Constitutional Court and the European Court of Justice.' In the first Venice Commission opinion there was indeed a recommendation not to incorporate the EU Charter of Fundamental Rights into the new constitution because this – according to the Venice Commission – could lead to conflicting interpretations, and the Hungarian Parliament actually did follow this advice (one of the very few recommendations that has been followed).[116] Thus the remark of the European Parliament does not really make sense in the new legal context, because the Charter has *not* been incorporated. It seems that those who prepared the Resolution did carefully read the opinions of the Venice Commission, but they failed to read the Basic Law itself. This, sadly, shows both a lack of actual legal expertise at the European Parliament, and a lack of curiosity about the real legal situation in Hungary. Many of the remarks of the European Parliament are well justified but such a serious mistake disappointingly endangers the credibility and honesty of the whole resolution, because it creates the impression that (regrettably, genuinely existing) legal issues were seized upon for party-political purposes.[117]

A few months later, and exactly one day after the infringement procedures against Hungary were announced by the European Commission, the European Parliament held a debate on Hungary (18 January 2012). Several political group leaders raised concerns not only over specific legal and constitutional provisions in Hungary, but also on what they saw as a wider undermining of democratic values in the country. Others vigorously opposed this view, warning that such an approach went too far.[118] The Liberal and the Green leaders, especially, seemed critical of the constitutional developments in Hungary. Obviously implying the

[116] As a matter of fact, the Government Bill concerning the judiciary was introduced even a few days before the publication date of the relevant Venice Commission opinion; it thus seems likely that the amendments were prepared on the basis of the draft opinion of the Venice Commission which had been sent to the Hungarian Government before publication.

[117] Para. 2 of this Resolution also contains a mandate for the Commission to conduct a 'thorough review and analysis' of the Constitution and the new 'cardinal laws.' It is unclear whether this is supposed to lead to a larger report on which the European Parliament should decide again, or whether it is just a vague rhetorical clause with no actual legal consequences.

[118] Orbán faces political group leaders in heated debate on Hungary, <www.europarl.europa.eu/news/en/headlines/content/20120113STO35298/html/Orb%C3%A1n-faces-political-group-leaders-in-heated-debate-on-Hungary>, visited 16 Jan. 2013.

possibility of an Article 7 TEU procedure against Hungary, liberal leader Guy Verhofstadt said that the conformity of the Hungarian constitution and 'cardinal laws' should be checked against basic EU values such as freedom, democracy, and the rule of law. The initiation of such a procedure was already demanded by Rebecca Harms and Daniel Cohn-Bendit, Co-Presidents of the Greens/EFA group in the European Parliament on 5 January 2012.[119] Even if the European Parliament could have proposed an Article 7 TEU procedure, this 'nuclear option' – which was obviously considered at least by some of the members of the European Commission as well[120] – was not used, and the European Parliament remained politically divided on this matter.

The life prospects of the New Basic Law, and the task of Hungarian legal scholarship

A workable constitution needs stability. According to empirical studies, stability depends on three factors: flexibility, an integrative character, and a sufficiently detailed constitution.[121] The Basic Law is sufficiently (or perhaps even more) flexible, as Article S) paragraph (2) requires, similarly to the Constitution, only a two-thirds majority for constitutional amendments. The text of the Basic Law cannot be said to be insufficiently detailed, either (the Basic Law is some 15% longer than the previous Constitution). It is, in turn, questionable whether the Basic Law does have an integrative character.[122]

A broad recognition of the Basic Law is made improbable by the historicising style of its language and the way it was drafted and adopted. Although by the autumn of 2010 a special parliamentary committee had elaborated and published the 'draft principles of the new constitution', these were later used only as a mere supplement. The Basic Law was drafted and adopted in a rather short period of time: the first draft was published on 14 March 2011, and Parliament already voted on the Basic Law on 18 April, 2011, i.e. not much more than one month later. Left-wing opposition parties refused to take part in the whole process, includ-

[119] Sven, 'Greens/EFA call for initiation of Art. 6 procedure against Hungary', <www.sven-giegold.de/2012/hungary-greensefa-call-for-initiation-of-article-7-procedure-against-hungary>, visited 16 Jan. 2013.

[120] Kroes threatens nuclear option against Hungary, 9 Feb. 2012, <www.euobserver.com/9/115209>, visited 16 Jan. 2013.

[121] Z. Elkins et al., *The Endurance of National Constitutions* (Cambridge University Press 2009) p. 65.

[122] On this problem with a more general outlook, *see* A. Jakab, 'On the Legitimacy of a New Constitution: Remarks on the Occasion of the New Hungarian Basic Law of 2011', in M.A. Jovanović and Đ. Pavićević (eds.), *Crisis and Quality of Democracy in Eastern Europe* (Eleven 2012) p. 61-76.

ing the vote, while the radical right voted against the Basic Law. Thus, the Basic Law was approved by the governing parties only.

Also the strong ideological charge of the Basic Law works against its integrative character. The preamble formulated along the lines of conservative values, religious allusions (naming the preamble 'National Avowal`, or the mentioning of responsibility to God in the Closing Provisions), and the shape of certain fundamental rights (e.g., in the case of the right to marry) may preclude a general acceptance of the Basic Law.[123]

Finally, the vetoes and the curtailment of the Constitutional Court's powers discussed above may also impede identification with the Basic Law on the part of the current opposition and their voters. This way, many regard the Basic Law not merely as the expression of a non-consensualist ideology, but also as a means of conserving Fidesz's power. It is for this reason that the idea of a far-reaching constitutional revision has already been formulated.[124] Even less radical opinions favour an amendment of the Basic Law which would ensure that a future opposition cannot block the adoption of laws necessary for the everyday operation of a government not controlling a two-thirds majority in Parliament.[125]

All these factors jeopardise the stability of the Basic Law. Even a completely new constitution-making might be possible if a two-thirds majority in Parliament were to be achieved by one or some of the opposition parties. If, in turn, a new government were to be elected without having a constitution-amending majority, an open constitutional crisis could not be excluded, as it might be tempting to amend or suspend the Basic Law by way of a referendum, an option not known to the Basic Law.[126] But even if the present governing parties were to win the next

[123] We do not agree with Gábor Halmai who requires a constitution to be ideologically neutral, *see* Halmai, *supra* n. 5, p. 147. In our view, no constitution is ideologically neutral and no constitution should be (rule of law and democracy are important ideological elements themselves, just like 'neutrality' itself). It is not neutrality, but *inclusion* that is missing. The problem is, namely, that the Basic Law does not consider the political views of a considerable part of the population as worthy enough to make rhetorical gestures towards them (as opposed to the preamble of the Polish Constitution where we do find a more inclusive rhetoric towards atheists), *see* the criticism by B. Schanda, 'Considerations on the Place of Religion in Constitutional Law', in Csehi et al. (eds.), *Viva Vox Iuris Civilis. Festschrift László Sólyom* (Szent István Társulat 2012) p. 285. It is especially strange and unintelligible in a society in which the population (incl. the voters and supposedly even the leaders of Fidesz) is much less religious than that of most European countries.

[124] Eötvös Károly Közpolitikai Intézet, 'Az alkotmányos korrekció lehetősége' [*The Possibility of Constitutional Correction*], 24 *ÉS* 2011, <www.es.hu/eotvos_karoly_kozpolitikai_intezet;az_alkotmanyos_korrekcio_lehetosege;2011-06-15.html>, visited 16 Jan. 2013.

[125] T. Csaba, 'Együtt élni az új alkotmánnyal' [*Living Together with the New Constitution*], *Haza és Haladás*, 18 May 2011, <www.hazaeshaladas.blog.hu/2011/05/18/egyuttelni_az_uj_alkotmannyal>, visited 16 Jan. 2013.

[126] This view was represented by M. Eörsi, 'Válasz Majtényi Lászlónak' [*Response to László Majtényi*], *ÉS*, 22 June 2011, <www.es.hu/eorsi_matyas;valasz;2011-06-22.html>, visited 16 Jan. 2013.

elections without obtaining a constitution-amending majority, they would then have to remove the walls built by themselves, which would no longer be possible without the co-operation of the opposition. Thus, relative stability can be expected from this Basic Law only as long as the present government has a constitution-amending majority in Parliament.

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